No. 7990

UNITED STATES
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

W. J. DONALD, Receiver of the Nogales National Bank of Nogales, Arizona, an Insolvent Corporation,

Appellant,

vs.

E. K. CUMMING,

Appellee.

Brief of Appellee

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TOPICAL INDEX

Index

TABLE OF CASES

Page

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STATEMENT OF THE CASE

The appellant correctly states the case in his brief. The Nogales National Bank, a national banking association, voluntarily suspended business on November 30, 1931, and on December 11, 1931, was determined to be insolvent by the Comptroller of the Currency, who appointed a receiver therefor on December 15, 1931. On January 14, 1932, the Comptroller levied an assessment of one hundred (100%) per cent on the stockholders and on January 30, 1932,

made written demand on the appellee, E. K. Cumming, for payment of his assessment, amounting to One Thousand ($1000.00) Dollars, on or before February 23, 1932. The appellee failed to pay the assessment and on January 12, 1935, an action was commenced against the appellee to enforce payment of the assessment. The appellee (defendant) demurred to the complaint upon the ground that the action was barred by limitation. The demurrer was sustained and the case was dismissed, to which exception was entered by the plaintiff.

The complaint was filed more than one year after the assessment was levied and demand was made for its payment, but less than three years after the assessment was levied and its payment demanded.

BRIEF OF ARGUMENT

The appellant contends that the action was not barred by limitation because of the provisions of Sections 227 and 2060 of the Revised Code of 1928 of the State of Arizona, which provide as follows:

> "Sec. 227. STOCKHOLDERS' LIABILITY. The stockholders of every bank shall be held individually responsible, equally and ratably, and not one for another, for all contracts, debts and engagements, of such corporation or association, to the extent of the amount of their stock therein, at par value thereof, in addition to the amount invested in such shares or stock. In case of the dissolution or liquidation of any bank, the constitutional and statutory liability

of the stockholders must be enforced for the benefit of the creditors of such bank by the superintendent of banks or by any receiver. The action to enforce such liability shall be commenced within three years after the closing of such bank, and may be commenced immediately upon the closing of the bank if in the judgment of the superintendent or receiver the assets of such bank are insufficient to meet its liabilities.

"Sec. 2060. THREE YEAR LIMITATIONS. There shall be commenced and prosecuted within three years after the cause of action shall have accrued, and not afterward, the following actions: 1. **Debt where the indebtedness is not evidenced by a contract in writing;** 2. upon stated or open accounts other than such mutual and current accounts as concern the trade of merchandise between merchant and merchant, their factors or agents; provided, that no item of any stated or open account shall be barred under the provisions hereof, so long as any item thereof shall have been incurred within three years immediately prior to the commencement of any action thereon; 3. for relief on the ground of fraud or mistake, which cause of action shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake." (Italics ours.)

The appellee contends that the action was barred by Section 2058 of the Revised Code of 1928 of the State of Arizona which provides as follows:

"Sec.. 2058. ONE YEAR LIMITATION There shall be commenced and prosecuted with-

in one year after the cause of action shall have accrued, and not afterward, the following actions: 1. For malicious prosecution, or for false imprisonment, or for injuries done to the character or reputation of another by libel or slander; 2. for damages for seduction or breach of promise of marriage; 3. **upon a liability created by statute, other than a penalty or forfeiture.**" (Italics ours.)

It is undisputed that the superadded liability of a stockholder of an insolvent national bank commences to run when the assessment is made by the Comptroller of Currency.

Forrest vs. Jack, 55 S. Ct. 370;
McClaine vs. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702;

Glenn vs. Marbury, 145 U. S. 499, 12 S. Ct. 914;

Armstrong vs. McAdams, et al., 46 Fed. (2d) 931;

Drain vs. Stough, 61 Fed. (2d) 668, 87 A. L. R. 490 (9th CC);

Hendrickson vs. Helmer, et al., 7 Fed. Supp. 627 (DC Ida.)

It is further undisputed that the Federal statutes contain no provision limiting the period within which suit upon such liability must be instituted, and as a consequence the state statutes of limitation apply.

McClaine vs. Rankin, supra;
Rankin vs. Miller, 207 Fed. 602;
Armstrong vs. McAdams, et al., supra.

Therefore, it only remains to determine whether,

for the purpose of the matter now being considered, this suit was "upon a liability created by statute other than a penalty or forfeiture", or was an action upon a "debt not evidenced by a contract in writing", or was governed by the provisions of Section 227 of the Arizona Code above quoted, which applies to state banks. If the suit was one upon a liability created by statute, the statute of limitations had run and the demurrer was properly sustained for the reason that the suit was filed more than one year after the cause of action accrued. If this action is not a suit upon a liability created by statute other than a penalty or forfeiture, the statute of limitations had not run and the demurrer was improperly sustained.

The Supreme Court states in Matteson vs. Dent, 176 U. S. 521, 525, 44 L. Ed. 573:

"It is not imposed by way of forfeiture or penalty."

In all cases involving a statute of limitation, in which it became necessary to determine if the liability is contractual or one imposed by statute, the courts have uniformly held that the liability is one created by statute.

McClaine vs. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, was an action to enforce the personal liability of a shareholder in a national bank under Section 5151 of the U. S. Revised Statutes. The statute of limitation of the State of Washington was involved, the sole question then being, as now, was the action one upon a contract or upon a liability created by statute? The Supreme Court held that the

action was one upon a liability created by statute, stating:

> "It is contended that the meaning of the word 'liability' as used in that subdivision is not restricted to contract liabilities, but, reading it with subd. 2 of Section 4798, and in view of the enumeration of other actions to enforce liabilities, we think that this cannot be so, and, indeed, the subdivision has been construed by the supreme court of Washington as applicable only to contracts. Suter v. Wenatche Water Power Co. 35 Wash 1., 76 Pac. 298; Sargent v. Tacoma, 10 Wash. 212, 38 Pac. 1048. The circuit court was of that opinion when the case was originally disposed of, and held that the cause of action arose by force of the statute, and did not spring from contract. 98 Fed. 378. But that judgment was reversed by the circuit court of appeals on the ground that the liability was not only statutory, but contractual as well, and that the limitation of three years applied in the latter aspect. 45 C. C. A. 631, 106 Fed. 791. Conceding that a statutory liability may be contractual in its nature, or more accurately, quasi-contractual, does it follow that an action given by statute should be regarded as brought on simple contract, or for breach of a simple contract, and, therefore, as coming within the provision in question?
>
> " * * * 'In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied from the express contract of the stockholders to take and pay for shares in the association.'
>
> "It is true that in particular cases the liability has been held to be, in its nature, contractual,

yet, it is nevertheless conditional, and enforceable only according to the Federal statute, independent of which the cause of action does not exist; so that the remedy at law in effect given by that statute is subject to the limitations imposed by the state statute on such actions.

"* * * The statute of limitations did not commence to run until assessment made, and then it ran as against an action to enforce the statutory liability, and not an action for breach of contract."

In Page vs. Jones, 7 Fed. (2d) 541 at 544, Judge Sanborn states:

"The double liability of a shareholder of a national bank under section 9689 for the payment of its debt is entirely statutory. It attaches, exists, and is enforceable and dischargeable at the times, in the maner, and for the purpose specified in the act of Congress. It attaches and exists for the purpose of creating a fund for the exclusive purpose of paying the creditors of the bank equably and ratably."

In Hendrickson vs. Helmer, et al., 7 Fed. Supp. 627 (DC Ida.), Judge Cavanah states:

"The demurrer to the complaint presents the principal question as to whether the relationship existing by reason of the bankrupt purchasing the stock was statutory or contractual and whether there was a debt or demand existing at the time of the transfer of the property by the bankrupt to his wife, or not until the bank had failed and the assessment made.

"The liability of a shareholder in a national bank to respond to an assessment in case of in-

solvency as prescribed by section 54, title 12 USCA, **is statutory,** and, upon the failure of the bank, the rights of its creditors intervene and attach. Scott v. Deweese, 181 U. S. 202, 21 S. Ct. 585, 45 L. Ed. 822; Concord First National Bank vs. Hawkins, 174 U. S. 364, 19 S. Ct. 139, 43 L. Ed. 1007; Salter v. Williams, et al. (D. C.) 219 F. 1017. It is for the benefit of the bank's creditors represented by the receiver of the bank, and is conditional and contingent, and the right to sue does not obtain until the Comptroller has acted, which is the basis of the suit. McClaine v. Rankin, 197 U. S. 154, 25 S. Ct. 410, 49 L. Ed. 702, 3 Ann. Cas. 500". (Italics ours.)

See also:

Forest vs. Jack, 55 S. Ct. 370;
Drain vs. Stough, 61 Fed. (2d) 668, 87 A. L. R. 490 (9th CC);
Laurent vs. Anderson, 70 Fed. (2d) 819;
Meek vs. Stein, 5 Fed. Supp. 656;
Studebaker vs. Perry, 148 U. S. 257, 46 L. Ed. 528.

Counsel for appellant quotes the following cases as authoritative upon the proposition that a stockholder's superadded liability is contractual rather than a liability created by statute:

Richmond vs. Irons, 121 U. S. 27, 30 L. Ed. 864;
Concord Bank vs. Hawkins, 174 U. S. 364, 43 L. Ed. 1007;
Matteson vs. Dent, 176 U. S. 521, 44 L. Ed. 573;
Whitman vs. Bank, 176 U. S. 559;
Bernheimer vs. Converse, 206 U. S. 516, 51 L. Ed 1163;

Converse vs. Hamilton, 224 U. S. 231, 56 L. Ed. 749.

In Richmond vs. Irons, supra, under the Illinois statute, there considered, the question did not arise as to whether the obligation was one imposed by statute.

In Concord Bank vs. Hawkins, supra, Matteson vs. Dent, supra, Whitman vs. Bank, supra, or Converse vs. Hamilton, supra, a statute of limitation was not involved or considered.

In Bernheimer vs. Converse, supra, cited by appellant, the court had no occasion whatsoever to decide or pass upon the question now before this Court, the only points there considered being as follows: Was the obligation impaired by later legislative action making the remedy more effectual; did the period of limitation apply which provided for bringing an action against a stockholder for a debt of the corporation within two years after he ceased to be a stockholder This case holds that the stockholder's liability arises by reason of the constitution of Minnesota, and that although the obligation is contractual in nature and is incurred upon the acquisition of the stock, that it springs primarily from the law whereby it is created. The court states:

> "It may be regarded as settled that, upon acquiring stock, the stockholder incurred an obligation arising from the constitutional provision, contractual in its nature, and, as such, capable of being enforced in the courts not only of that state, but of another state and of the United States (Whitman v. National Bank, 176

> U. S. 559, 44 L. Ed. 587, 20 Sup. Ct. Rep. 477), although the obligation is not entirely contractual, and **springs primarily from the law creating the obligation** (Christopher v. Norwell, 201 U. S. 216, 50 L. Ed. 732, 26 Sup. Ct. Rep. 502.)" (Italics ours.)

In Hiring vs. Hamlin, 200 Iowa 1322, 206 N. W. 617, and Howarth vs. Angle, 162 N. Y. 179, 56 N. E. 489, cited by appellant, a statute of limitations was not involved and the courts were therefore not called upon to determine if the action was one upon a liability created by statute as distinguished from the obligation of an implied contract.

Whittier vs. Visscher, 189 Cal. 450, 209 Pac. 23, involved only the question of whether or not the stockholder's superadded liability was sufficiently contractual in nature to support a counterclaim in a suit upon a promissory note.

In San Luis Obispo vs. Gage, 139 Cal. 398, 73 Pac. 174, the court states on page 177:

> "The claim in controversy does not arise upon any express formal contract inter partes between the plaintiff on the one hand and the state of California on the other. It arises, if at all, from the effect of the act of 1880, and the subsequent performance by the respondent of the conditions which bring it within the terms of the statute. It is, in one sense, a liability arising from a statute; but it does not follow that it may not, nevertheless, be a contract. Contracts may be made or evidenced by a statute, and by conduct ensuing thereupon, as well as by other means or evidence. Thus, it is held

> in Kennedy v. Bank, 97 Cal. 96, 31 Pac. 846, 33 Am. St. Rep. 163, that the statutory liability of a stockholder in a corporation to pay his proportion of a debt due from the corporation, itself, is a contract within the meaning of the law which limits the right of attachment to actions upon a contract. And in Dennis v. Superior Court, 91 Cal. 548, 27 Pac. 1031, it was held that this statutory liability 'is an obligation arising upon contract within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court, in actions arising upon contracts,' where the amount claimed is less than $300. In Hillsborough County v. Londonderry, 43 N. H. 451, an action to recover money, paid by a county for the support of a pauper, against the town which was made especially chargeable for his support by the statute, was held to be a case wherein the law implied a contract to make the payment, and that therefore an action of assumpsit would lie. It seems to be well settled 'that the general rule is that, for money accruing due under the provisions of a statute, the action of assumpsit may be supported, unless another remedy is expressly given.' "

The suit was brought by a county against the state for the support of orphans, under appropriate statutory provisions.

It is apparent that none of the above mentioned cases relied upon by appellant are authoritative upon the point of law now being considered.

Appellant places great reliance upon Fredericks vs. Hammons, 33 Ariz. 310, 264 Pac. 687. In that case, also, the statutory nature of the obligation was not

considered or questioned. The Arizona Supreme Court held that a stockholder's double liability constitutes such a "contract for the direct payment of money" as will support an attachment. The Arizona statute upon attachment (Sections 4241 to 4257 of the 1928 Code) divides causes of action into two classes: action upon a contract, express or implied, and actions for damages. Not being an action for damages, a stockholder's liability must necessarily be considered an action upon an implied contract for the purpose of attachment. The Arizona statute on garnishment (Section 4258 of the 1928 Code) provides that a writ of garnishment may issue where the plaintiff sues for a debt, and defines the term "debt" as being every claim or demand for money not arising from tort. Not being a demand arising from tort, an action upon a stockholder's double liability is clearly a debt under the definition of the statute.

Colman vs. Button, 42 Ariz. 141, 22 Pac. (2d) 1078, relied upon by appellant, holds that a stockholder in a state bank, under the provisions of the statute and the constitution, impliedly agrees to the extent of the amount of his stock to be responsible for the debts of the bank, even though his stock certificate was wrongfully withheld from him. The following quotation from the first paragraph of the decision is interesting:

> "This is an action by James B. Button, superintendent of banks, to enforce the **constitutional and statutory liability** of C. H. Colman as a stockholder of the Yuma Valley Bank, in course of liquidation." (Italics ours.)

Appellant's statement on page 15 of his brief that the Arizona decisions hold the obligation to be contractual is misleading. When the Arizona Supreme court has considered the general nature of such an action as arising from contract or tort, it has declared it to be contractual under some circunstances because of the implied contract connected with every subscription for bank stock. Nevertheless, the liability of the stockholder, although quasi-contractual, is wholly dependent upon the statute which imposes such liability. But when squarely confronted with the question now before this Court, the Arizona Supreme Court has declared that the cause of action is based upon a liability created by statute and the one year statute of limitation applies. The court states in Cowden vs. Williams, 32 Ariz. 407, 259 Pac. 670:

> "The second and more difficult question is the application of the statute of limitations. It is contended by appellants that the action is governed by subdivision 3, paragraph 709, Revised Statutes of Arizona, 1913, Civil Code, which reads as follows:
>
> '709. There shall be commenced and prosecuted within one year after the cause of action shall have accrued * * *
>
> '(3) An action upon a liability created by statute, other than a penalty or forfeiture.'
>
> "Appellee suggests that, since the charter of the bank, as well as the constitutional provision, imposes the double liability, it may be that the case is within the six-year provision of the statute (Civ. Code 1913, Sec. 714, as amended by Laws 1917, chap. 76, Sec. 2), refer-

ring to contracts in writing. He does not, however, urge this point or cite any authorities in support thereof, and we are satisfied it is not well taken. The matter is governed by subdivision 3, paragraph 709, supra."

Courts have held such an obligation to be quasi-contractual because of the implied agreement or submission of the stockholder to the statutory provision. But the apparent contradiction, after considering only that one phase of the subject, is not real and disappears when thought is directed to the statutory nature of the action, as stated in Christopher vs. Norvell, 26 S. Ct. 502, 201 U. S. 216, 50 L. Ed. 732:

"The argument made in this case in behalf of Mrs. Christopher assumes that the liability sought to be fastened upon her arises wholly out of contract; that is, out of an implied obligation, at the time her name was placed on the registry of shares and she received dividends, to contribute to the extent of the value of such shares to the payment of the debts of the bank. But that implied obligation, although, contractual in its nature, could not, standing alone, be made the basis of this action. Without the statute she could not be made liable individually for the debts of the bank at all. No implied obligation to contribute to the payment of such debts could arise from the single fact that she became and was a shareholder. Her liabilty for the debts of the bank is created by the statute, although in a limited sense there is an element of contract in her having become a shareholder; and the right of the receiver to maintain this action depends upon, and has its sanction in, the statute creating liability against each share-

holder, in whatever way he may have become such. There have been cases in which there appeared such elements of contract as were deemed sufficient, in particular circumstances, to support an action. First National Bank v. Hawkins, 174 U. S. 364, 372, 43 L. Ed. 1007, 1011, 19 Sup. Ct. Rep. 739; Whitman v. National Bank, 176 U. S. 559, 565, 566, 44 L. Ed. 587, 591, 592, 20 Sup. Ct. Rep. 477; Matteson v. Dent, 176 U. S. 521, 44 L. Ed. 571, 20 Sup. Ct. Rep. 419. But that fact does not justify the contention that an action upon an assessment made by the Comptroller is not based upon the statute.

" '* * * **In none of the numerous cases upon the subject in this court is this obligation treated as an express contract, but as one created by the statute and implied** from the express contract of the stockholders to take and pay for shares in the association' " (Italics ours.)

In Armstrong vs. McAdams, et al., 46 Fed. (2d) 931, the Circuit Court of Appeals, Eighth Circuit, held that an action against a stockholder of a national bank is not contractual and is not barred by the Arkansas statute of limitations concerning actions upon contracts in writing. Apparently the State of Arkansas does not have a statute of limitation similar to the one year statute of Arizona.

In Kennedy vs. California Saving Bank, (Cal.) 31 Pac. 846, the California Supreme Court holds that the personal liability of a stockholder for his portion of the corporate debts is contractual in that an action thereon will support an attachment; but the court also considers the other phase of the proposition and states:

"In the case of Dennis v. Superior Court, above cited, the question whether an action like this was one arising upon contract was directly involved, and we there said: 'We think that the personal liability of a stockholder of a corporation for his proportion of the indebtedness of the corporation is an obligation arising upon contract, within the meaning of section 112 of the Code of Civil Procedure, giving original jurisdiction to a justice's court in actions arising upon contract for the recovery of money when the amount claimed is less than $300.' The views here expressed are not in conflict with what was decided in Green v. Beckman, 59 Cal. 545, and the other cases following it which are relied upon and cited by defendant. In those cases the question was whether an action like this against a stockholder was upon a 'statutory liability', within the meaning of section 359 of the Code of Civil Procedure, which provides that actions against directors or stockholders of a corporation to recover a penalty or forfeiture imposed, or to enforce a liability created by law, must be brought within the time there specified. The court, in Green v. Beckman, supra, held that it was; that the legislature must have intended the section to apply to such an action; otherwise it was meaningless, in so far as it related to actions against stockholders. The court in that case said: 'The construction of section 359 of the Code of Civil Procedure is not free from difficulty. * * * Our attention has not been called to any provision of the statute which imposes any 'penalty' or 'forfeiture' upon a stockholder for any act as such, and no effect can be given to the words 'liability created by law', unless we apply it to the liability which

> the law imposes when one becomes a stockholder, and thus establishes the relation to the creditors of the corporation to which the law affixes the responsibility.' There is no intimation in this language, nor did the court there intend to hold, that such an action might not also be regarded as based upon 'contract', within the general meaning of that phrase, or as used in other chapters of the Code of Civil Procedure; but the court simply held that for the purposes of that section, and in the connection in which they there appear, the words 'liability created by law' should be construed as referring to actions, such as this, to enforce the liability of stockholders."

The State of Texas lacks a statute similar to the one year statute of Arizona for which reason we deem it unnecessary to consider the Texas cases quoted by appellant.

We, therefore, submit that, insofar as this action is concerned the obligation of the appellee is a liability created by statute and is barred by the one year statute.

Appellant's argument that in any event the limitation of three years as provided in the Arizona Banking Act (Section 227 of the 1928 Code) should apply to this case is destroyed by the following quotation stated on page 6 of appellant's brief in support of that argument:

> "A National bank is subject to state law **unless that law interferes with the purpose of its**

creation or destroys its efficiency or is in conflict with some Federal law;" (Italics ours.)

Section 227 is a part of the Arizona Banking Code and applies only to state banks. Every section and paragraph in the act is aimed at state banks. The language of the act positively excludes from its provisions every bank that is not organized and doing business pursuant thereto. Nearly every section of the act conflicts with the National Banking Act, and an attempt to apply the State act to a national bank would "destroy its efficiency" and "conflict with some Federal Law". This is especially true of Section 227. The additional liability of the stockholder, according to Section 227, must be enforced by the state superintendent of banks or the receiver, not by the Comptroller of the Currency. This is in direct conflict with the Federal law. The provisions of Section 227 are irreconcilable with the Federal law respecting appointment of a receiver, assessment of the stockholder, and enforcement of payment. Section 227 provides that an action to enforce a stockholder's double libility shall be commenced within three years after the closing of the bank, with the effect that the statute commences to run upon the "closing" of the bank, while under the Federal law the statute commence to run when the Comptroller of the Currency makes the assessment. Appellant's effort to favor himself with the provisions of Section 227 works to his disadvantage for the reason that this action was not commenced within three years after the Nogales National Bank was closed on November 30, 1931.

Although it is fundamental and elementary that

a single phrase of a statute may not be isolated and applied in exclusion of other provisions, appellant refuses to accept the portion of Section 227 which is unfavorable to him, but insists that the part which is favorable to him should apply. His effort to favor himself with the three year period under Section 227 is accompanied by his rejection of that part of Section 227 which provides that the statute begins to run the day the bank is closed. With like propriety the appellee could argue that the action is barred by Section 227 because not brought within three years after the bank closed, which, however, we refuse to do in view of the utter inapplicability of that statute.

CONCLUSION

For the reasons herein advanced, we respectfully submit that appellant's cause of action was barred by the one year statute of limitations, the demurrer was properly sustained, and the action of the District Court should be affirmed.

Respectfully submitted,

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